

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6167

To be argued by
JAN F. CONSTANTINE

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6167

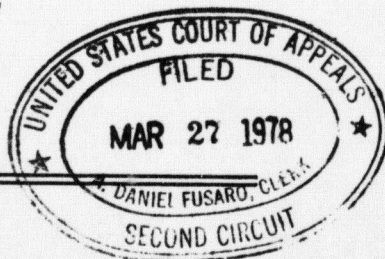
ROBERT A. LENNON,
*Plaintiff-Appellee-
Cross-Appellant,*
—against—

UNITED STATES OF AMERICA,
*Defendant-Appellant-
Cross-Appellee.*

REPLY BRIEF FOR THE APPELLANT

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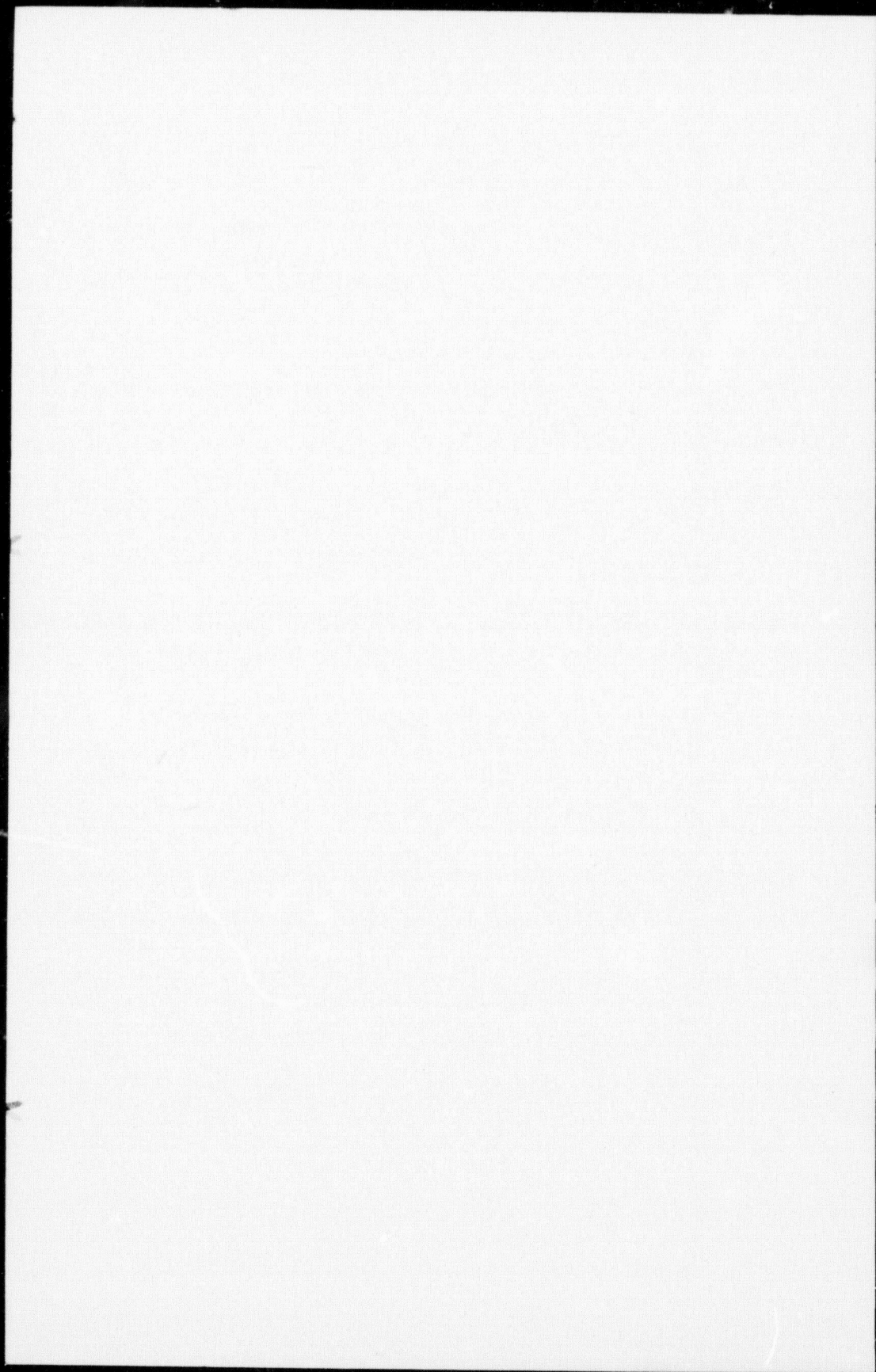


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FOR THE SECOND CIRCUIT

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ROBERT A. LENNON,

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—against—

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REPLY BRIEF FOR THE APPELLANT

Preliminary Statement

The United States, defendant-appellant herein, submits this reply brief in answer to the brief of the plaintiff, Robert A. Lennon, challenging on cross-appeal the adequacy of the \$600,000 judgment granted to him by the district court (Mark A. Costantino, Judge). The facts are set forth in our opening brief, in which we argue that the \$600,000 award was excessive and should be reduced. Plaintiff argues in his brief that the award was inadequate since the court below improperly failed to consider and include loss of earnings and loss of future earning capacity in determining the amount of the award. Specifically, plaintiff argues that the amputation of his leg has prevented him from becoming an electrician.

ARGUMENT

The district court properly found that plaintiff failed to meet his burden of specific proof on loss of earnings.

The district court here properly found that plaintiff failed to meet his burden of specific proof with respect to lost earnings and earning potential since plaintiff never sufficiently substantiated his claims in this regard—particularly, his claim that the amputation prevented him from pursuing a career as an electrician. Under these circumstances, the district court properly rejected plaintiff's *specific* claims of future and present lost earnings as speculative and unfounded. As we show below, there is no merit to plaintiff's claim here that the award should be increased to reflect his asserted income as an intended electrician.

1. We note preliminarily that, while plaintiff failed to prove his loss of income as an electrician, the district court did take into consideration the obvious fact (hardly requiring proof) that the amputation generally restricted the range of plaintiff's job opportunities. Upon evaluating the evidence presented by plaintiff relating to the issue of damages, the district court found as follows:

The evidence introduced to establish plaintiff's loss of earnings was speculative, at best. While plaintiff has proved that the range of jobs available to him is reduced, he has not proved that his residual earning capacity has been diminished. This Court, after considering all the evidence including the medical evidence and testimony relating to plaintiff's pain, suffering and future medical needs

concludes that plaintiff is entitled to recover the sum of \$600,000 from defendant.¹

In its supplemental findings, the court adopted an agreed-upon \$25,000 figure representing plaintiff's future medical costs (A-21). The balance of the verdict, at least \$575,000, was awarded as general damages (A-15, 19-21).

Thus, in granting the award, the district court expressly recognized that the range of jobs available to plaintiff would be limited as a result of the loss of his leg. It is evident from all the circumstances that the district court considered this restriction in job opportunities in awarding general damages. Under applicable state law, such an impairment in future earning capacity is an element of general damages. 7A Warren, *Negligence in the New York Courts*, Ch. 4, Section 1.01[2]. Indeed, none of the parties disputed below that such consequences should be figured into plaintiff's award. Moreover, the disproportionate amount of the verdict representing general damages (see our opening brief) clearly indicates that, in addition to pain and suffering, plaintiff was compensated for the inchoate impairment of future earning capacity, principally in the reduction of the range of jobs available to him which naturally flowed from the amputation of his leg. In short, the district court was aware that, since plaintiff was an amputee, his job possibilities were necessarily reduced; and the court acknowledged this consequence of the amputation by including it as a factor in awarding him general damages.²

¹ Findings of Fact and Conclusions of Law, August 10, 1977 (A-15). At the request of the parties, the district court rendered supplemental findings of fact with regard to damages on November 8, 1977 (A-19-21). We have challenged certain of these findings in our main brief (pp. 8-13).

² In finding that plaintiff failed to meet his burden of specific proof with respect to loss of earnings, the district court stated that plaintiff had not proved a loss of "residual earning capacity". In our view, the use of that phrase was technically erroneous.

[Footnote continued on following page]

2. In his brief, plaintiff takes issue with the court's finding of fact as to the "speculative" nature of plaintiff's evidence concerning loss of earnings. Plaintiff characterizes (Br. 14) his proof on past earning losses and loss of future earning capacity as "clear and explicit". We disagree.

With respect to earning capacity, we note that although plaintiff claims that he would have in all probability become a union electrician but for the loss of his leg, this claim is not supported by the evidence of record.³ Plaintiff's alleged experience as an electrician consists of eight months as a part-time, after-school helper at Rothbell Electric, a local electrical contractor (A-41, 47, 190), and another five months with Vetco, a small general contracting firm where he never performed any major electrical work (A-51-55, 195). In addition, plaintiff was never enrolled in a formal apprenticeship program for

It is clear, however, that the district court's analysis on this matter was substantively correct, since the court, in assessing general damages, took into account its finding that "plaintiff had proved that the range of jobs available to him is reduced" (A-15). Thus, while the district court's analysis was correct, his phraseology arguably was not. This surely is a matter of form rather than substance and should not affect the overall propriety of the district court's findings with regard to loss of earnings.

³ Plaintiff also claims that he is totally and permanently disabled due to the condition of cellulitis which aggravates the healing of his stump and which prevents extended use of a prosthesis. We have discussed the contradictions inherent in the district court's findings with respect to the permanence and correctability of plaintiff's cellulitis condition in our main brief (pp. 8-13). The issue of the extent of plaintiff's disability and his ability to mitigate his losses is also relevant to the general matter of plaintiff's future earning capacity. Thus, if plaintiff's cellulitis condition is not permanent and can be corrected by a stump revision (as we have argued), then it follows that more jobs would be available to him and the impairment of his future earning capacity would necessarily be diminished. Under these circumstances, a reduction in general damages would be warranted if this court agrees with our view that the district court's finding on the "permanence" of plaintiff's condition is clearly erroneous.

electricians (A-190); he had no formal experience or training as an electrician (A-191); and he was not a licensed electrician, nor did he belong to an electrician's union (A-190).

Moreover, after his discharge from the Marine Corps (in September, 1971), plaintiff did not seek work as an electrician either before or after losing his leg (in June, 1972) but, in fact, was employed as a chimney-sweep, gas station attendant, chauffeur and dispatcher of mechanics (A-136-145, 197-200). In addition, by his own admission, he is classified by the New York State Employment Service as a "worker-mechanic" (A-143), not as an electrician.

Thus, there is no indication that plaintiff was at any time an electrician or apprentice electrician, or that he seriously entertained an ambition to pursue a career as an electrician after leaving the Marine Corps in September, 1971. In this regard, plaintiff relies heavily on the testimony of Richard Farrell, Vice President of Mebco Industries, that, had plaintiff approached him, he *would have sponsored* him in the electrical union apprenticeship program (A-358-361; Plaintiff's Brief pp. 10-11, 15). The record clearly shows that plaintiff had ample opportunity to seek out Mr. Farrell prior to his initial injury in June 1972, but never did so. And it was not until April, 1976, after plaintiff lost his leg, that Mr. Farrell first hired him (as a truck dispatcher) (A-354, 378). For these reasons, Mr. Farrell's hypothetical statement as to his would-be conduct had plaintiff in fact contacted him is certainly "speculative", and was properly disregarded by the district court as such.

In attempting to support his argument that the judgment should have included his loss of earnings as an electrician, plaintiff relies on the testimony of Dr. Lawrence Ritter, Professor of Economics and Finance at New York University, who testified as an expert in the field of money and banking (A-392-395). Professor Ritter testi-

fied that *if* plaintiff had become a union electrician, earning the wages as described by Mr. Farrell (A-369-372), plaintiff's future income loss would be between \$509,913 and \$1,330,290 (A-410-415). This testimony, too, is insignificant in light of the remoteness of the possibility that plaintiff, but for the amputation, would have had a career as a union electrician or even as an electrician apprentice. Even Professor Ritter's data base is suspect, as the figures used in his calculations were based entirely on Mr. Farrell's testimony. Since Mr. Farrell was not connected with the union nor familiar with the entire union contract, he hardly can be said to be an "expert" for the purposes of interpreting the union contract and the provisions therein (A-382, 386-387).

With respect to lost earnings, plaintiff also never met his burden of specific proof since he based his claim entirely on the speculative assertions that the government's negligence prevented him from earning \$63,000 as an electrician apprentice. Plaintiff also never substantiated his claim of lost earnings by proving his actual earnings for a period before the accident or for the period following the accident, although occasional bits of evidence on these matters were adduced, largely on cross-examination.⁴ We

⁴ Damages in a suit under the Federal Tort Claims Act are to be determined in accordance with the law of the state in which the tort occurred. 28 U.S.C. Section 2674; *Hatahley v. United States*, 351 U.S. 173, 182 (1956). The two principal elements to be considered in assessing damages under New York State Law are (1) loss of earnings past and future and (2) other damages resulting from the nature and extent of the injury. 7B Warren *Negligence in the New York Courts*, Ch. 20, Section 2.25, p. 348. Under settled precedent, the customary proof for determining lost earnings (apart from pain and suffering and special damages) is the average salary or income for a period of years before injury multiplied by the applicable life or work expectancy. See *O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959). Plaintiff has failed to conform his proof to the accepted formula, and therefore cannot prevail under New York Law.

also note that the largest salary which plaintiff has ever received was the \$230 per week that he earned as a radio dispatcher after his amputation (A-205). The fact that plaintiff earned more money after amputation of his leg than at any time in his working career, before or after his initial injury, lends further support to our argument that the award is excessive. (Although plaintiff asserted that his injuries prevented him from retaining his job as a radio dispatcher, the district court properly gave little weight to this self-serving testimony as is apparent from the court's finding that plaintiff's evidence on lost earnings was "speculative at best.")

Therefore, the evidence presented by plaintiff in support of his claim for loss of future earnings in the amount of \$1,330,000 and past earnings losses of \$63,000 is clearly "speculative at best," as the district court found. Thus, the finding of the court below, that plaintiff failed to prove loss of earnings, cannot be said to be "clearly erroneous" and, as such, should not be overturned by this Court. Rule 52(a), F.R. Civ. P.; *Hayes v. United States*, 367 F.2d 340 (2d Cir. 1966); See also, *McAllister v. United States*, 348 U.S. 19, 20 (1954); *Cunningham v. Rederiet Vendeggen A/S*, 333 F.2d 308, 312 (2d Cir. 1964).

3. Attacking the sufficiency of the award, plaintiff refers to a number of cases wherein substantial verdicts were awarded to plaintiffs who suffered permanent leg injuries. We submit that all of these cases are readily distinguishable from the instant action and that they therefore do not suggest any inadequacy in the award at issue here.

For example, *DeSantis v. Parker Feeders, Inc.* 547 F.2d 357 (7th Cir. 1976), and *Lovaglio v. Chen*, (Supreme Court, Kings County, 1977), both involved injuries to young children who could be expected to suffer emotional injury and mental anguish during their forma-

tive years as a result of their physical impairment. In *DeSantis*, a six-year-old boy suffered the "terrifying experience" of being caught in a grain auger where both his low^{er} legs and thighs were repeatedly slashed by the whirling blades. He underwent four major operations in one year resulting in the loss of a leg. He was found to have suffered a post-traumatic personality disorder directly attributable to his injuries. Under these circumstances, an award of \$840,000 was affirmed. The plaintiff in *Lovaglio* was a three-year-old girl who entered the hospital for treatment of a kidney ailment and, after a resident negligently took a blood sample from her groin area, left with her right leg amputated below the knee. The grossness of the resident's negligence and the extent of the injuries, together with the extreme youth of the plaintiff, contributed to the large verdict of \$1,250,000—which was nevertheless reduced to \$750,000 by the Appellate Division.

In contrast, plaintiff in this case is a young adult who is better equipped both mentally and emotionally to cope with his physical impairment. Further, although we do not contest on appeal the district court's findings as to liability, the evidence of record reveals that defendant's negligence, unlike that of the resident in *Lovaglio*, could not fairly be characterized as gross, and, in fact, no finding of gross negligence was made by the court.⁵

In fact, all the cases cited by plaintiff involve either injuries exacerbated by trauma (*Ventricelli v. Kinney System Rent A Car, Inc.*, 399 N.Y.S. 2d 237, — A.D.

⁵ The cases concerning damages awarded to older plaintiffs with relatively short life and work expectancies are equally inapposite here in that such individuals are less able to adjust physically and mentally to permanent injuries than are young, healthy adults. See *Fruit v. Schreiner*, 502 P.2d 133 (Sup. Ct. of Alaska, 1972).

2d — [1st Dept. 1977]); a breach of extraordinary duty of care (*Carreras v. Honeggers and Co.*, 244 N.W. 2d 10 [Mich. App. 1976]); other extenuating circumstances, including age and family responsibility (*Fruit v. Schrenier*, 502 P.2d 133 [Sup. Ct. of Alaska, 1972]); or a combination of the above (*Bishop v. Metropolitan Transportation Authority*, 400 N.Y.S. 2d 2, — A.D. 2d — [1st Dept. 1977]).

Thus, after reviewing these cases we would agree with plaintiff's contention that the case at bar is "unique" (Plaintiff's Brief, pp. 18-19). However, its uniqueness stems, not from plaintiff's extraordinarily high future earning capacity as plaintiff suggests, but rather from the enormity of the \$600,000 judgment, which does not reflect a proper appreciation of plaintiff's resiliency, his potential for recuperation and, most important, his ability to mitigate his loss of future earnings.⁶

⁶ It is clear that plaintiff can mitigate his losses given the circumstances of this case. As previously stated, it is our contention that the district court's finding that plaintiff's condition was permanent is clearly erroneous in that the entire credible evidence on record demonstrates that a stump revision would alleviate the problems described by plaintiff which heretofore have allegedly inhibited his employment. (Defendant's Opening Brief, pp. 11-13). Moreover, plaintiff testified at trial that he intended to attend college in the future (A-202), thereby increasing his job opportunities, notwithstanding the loss of his leg.

CONCLUSION

For the foregoing reasons, the district court's findings with respect to plaintiff's failure to prove loss of earnings and diminished future earning capacity should be affirmed, and the verdict appealed from should be reduced and, as modified, the judgment should be affirmed.

Dated: Brooklyn, New York
March 22, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Harvey M. Stone being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 24th day of March 1978 he served a copy of the within
Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

Joseph Kelner, Esq. 225 Broadway, Suite 1501, New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Harvey M. Stone

Sworn to before me this

24th day of March 1978

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979